

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STUC-O-FLEX INTERNATIONAL,
INC., a Washington corporation,

Plaintiff,

vs.

LOW AND BONAR, INC., a Delaware
corporation; WALFLOR INDUSTRIES,
INC., a Washington corporation;
WATERWAY RAINSCREEN, LLC, a
Washington limited liability company;
JOHN URAL, an individual; MIKE
CZERWINSKI, an individual; JIM
HEWITT, an individual; and
PACIFICWEST INDUSTRIES, INC., a
Washington corporation,

Defendants.

No. 2:18-cv-01386-RAJ

**ORDER GRANTING
DEFENDANTS' PARTIAL
MOTION TO DISMISS**

This matter comes before the Court on Defendant's Partial Motion to Dismiss (Dkt. # 12). Having considered the submissions of the parties, the relevant portions of the record, and the applicable law, the Court finds that oral argument is unnecessary. For the reasons stated below, Defendants' Motion is **GRANTED**. Dkt. # 12.

I. BACKGROUND

The following is taken from Plaintiff's Amended Complaint (Dkt. # 1-2), which is assumed to be true for the purposes of this motion to dismiss, along with any judicially noticed documents.¹ *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).

Plaintiff, Stuc-O-Flex International, Inc. ("Stuc-O-Flex" or "Plaintiff") is a Washington-based distributor of stucco and siding products. Dkt. # 1-2 at ¶ 3.1. One of the products patented and distributed by Plaintiff is "Waterway Rainscreen," a rainscreen product that is installed between the exterior framing of a home and the stucco finish to facilitate drainage of moisture away from the stucco. *Id.* at ¶ 3.3.

Defendant John Ural ("Defendant Ural" or "Ural") was a licensed siding contractor in Washington, when he became a customer of Stuc-O-Flex in 2003. *Id.* at ¶ 3.4. In 2011, Defendant Ural decided to enter the manufacturing sector and purchased an "extruder" machine which would allow him to manufacture, among other things, rainscreen products. Dkt. # 1-2 at ¶ 3.5. After receiving the machine, Defendant Ural formed a separate manufacturing entity, Defendant Waterway Rainscreen, LLC ("Defendant Waterway" or "Waterway"). *Id.* at ¶ 3.9.

In 2012, Plaintiff entered into an exclusive distribution agreement with Defendants Ural and Waterway. *Id.* at ¶ 3.10. Under the agreement, Plaintiff agreed to be the exclusive distributor of all products manufactured by Defendant Ural within the United States. *Id.* In March 2013, Plaintiff and Defendants Ural and Waterway entered

¹ Defendants ask the Court to take judicial notice of Dkt. # 13-1, the stock purchase agreement between Defendants Low & Bonar, Inc. and Walflor Industries, Inc. Dkt. # 12 at 10. In the context of a motion to dismiss, the Court's review is generally limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). However, the Court may consider documents that are referenced extensively in the complaint or form the basis for plaintiff's claim, when determining whether the allegations of the complaint state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). *United States v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir. 2003). Because the stock purchase agreement falls within this exception, the Court will consider this document in connection with Defendants' Motion.

1 into an updated distribution agreement, extending the agreement to include both United
2 States *and* Canadian markets. *Id.* at ¶ 3.13. In exchange, Defendant Ural agreed not to
3 sell rainscreen products to any other third parties. *Id.*

4 In 2011, Defendant Ural also formed a Canadian company, Water Wave
5 Building Supply, Inc. (“Water Wave”), with Defendant Mike Czerwinski (“Defendant
6 Czerwinski”), for the purpose of distributing and selling its products in Canada. *Id.* at ¶
7 3.7. On September 25, 2012, Defendant Ural sold his interest in Water Wave to
8 Defendant Jim Hewitt (“Defendant Hewitt”) and Water Wave entered into a distribution
9 agreement with Defendant Ural, under which Water Wave agreed to be the exclusive
10 distributor of Defendant Ural’s products in Canada. *Id.* at ¶ 3.11.

11 At some point, Plaintiff began to receive invoices for its rainscreen products
12 from Defendant PacificWest (“PacificWest”), another company owned by Defendants
13 Hewitt and Czerwinski. *Id.* at ¶ 3.14. According to Plaintiff, Ural said that he was just
14 using the PacificWest name for insurance purposes, when in fact, he was selling the
15 rainscreen products to PacificWest directly, in violation of Plaintiff’s distribution
16 agreement. *Id.* at ¶¶ 3.16–3.17. Plaintiff alleges that Ural was also selling its rainscreen
17 products to Water Wave and Defendant Walflor Industries, Inc. (“Walflor”), a third
18 Hewitt/Czerwinski entity, and that Water Wave and Walflor were selling the products to
19 other third parties. *Id.* at ¶¶ 3.18–3.19.

20 In 2015, Defendant Ural attempted to sell 100% of his Waterway stock to
21 PacificWest. *Id.* at ¶ 3.21. According to Plaintiff, the parties ran into an issue because
22 the extruder machine was not owned by Waterway directly, but rather a different Ural
23 entity. *Id.* at ¶ 3.22. On February 10, 2016, Defendants Ural, Hewitt, and Czerwinski
24 agreed that Ural would sell the extruder machine to Walflor and, in exchange, he would
25 receive a 33% share of Walflor and join Walflor as a Vice President and member of the
26 Board of Directors. *Id.* at ¶ 3.24. Plaintiff learned of the sale by email in January 2016.
27 *Id.* at ¶ 3.28. According to Plaintiff, Defendant Ural represented that Plaintiff’s

1 exclusive distribution agreement would still be honored by Walflor when, in fact,
2 Walflor was selling rainscreen products to other third parties. *Id.* at ¶¶ 3.29–3.30.

3 After Walflor purchased the extruder machine, Defendants Ural, Hewitt,
4 Czerwinski, and Walflor executed a letter of intent with Defendant Low & Bonar (“Low
5 & Bonar” or “Defendant Low & Bonar”), a multi-national corporation purportedly
6 interested in expanding into the rainscreen and sound control mat business. *Id.* at ¶¶
7 3.31–3.34. On January 17, 2017, the parties executed a stock purchase agreement,
8 under which Low & Bonar purchased 100% of Walfor’s stock. *Id.* at ¶ 3.24. Stuc-O-
9 Flex’s exclusive distribution agreement with Defendant Ural was not listed as a material
10 contract during the due diligence process, prior to the sale. *Id.* at ¶ 3.36. Shortly after
11 the sale closed, Low & Bonar informed Plaintiff that it was increasing the price of the
12 rainscreen product to 7%. *Id.* at ¶ 3.37. Low & Bonar also proceeded to manufacture
13 and sell rainscreen products to other third parties. *Id.* at ¶ 3.38.

14 On November 29, 2017, Plaintiff filed suit in King County Superior Court,
15 alleging breach of contract, tortious interference, trademark infringement, and
16 Washington Consumer Protection Act claims. Dkt. # 1-1. Plaintiff subsequently
17 amended its complaint (Dkt. # 1-2), incorporating federal trademark claims, and on
18 September 17, 2018, Defendants removed to this Court. Dkt. # 1. Defendants now
19 move to dismiss Plaintiff’s breach of contract claim as to Defendant Low & Bonar and
20 the tortious interference and alter ego/veil piercing claims as to all Defendants. Dkt. #
21 12.

22 **II. DISCUSSION**

23 The question for the Court on a motion to dismiss is whether the facts in the
24 complaint and judicially-noticed documents sufficiently state a “plausible” ground for
25 relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a complaint
26 need not provide detailed factual allegations, it must offer “more than labels and
27 conclusions” and contain more than a “formulaic recitation of the elements of a cause of

1 action.” *Twombly*, 550 U.S. at 555. If the complaint fails to state a cognizable legal
2 theory or fails to provide sufficient facts to support a claim, dismissal is appropriate.
3 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984).²

4 **1. Breach of Contract**

5 Defendants first argue that Plaintiff has failed to state a claim for breach of
6 contract against Defendant Low & Bonar. Dkt. # 12 at 10. In Washington, a plaintiff
7 claiming breach of contract must prove: (1) the existence of a valid agreement (2)
8 breach of the agreement, and (3) damages. *Univ. of Wash. V. Gov't Emps. Ins. Co.*, 200
9 Wn. App. 455, 467 (citing *Leher v. State, Dep't of Social & Health Servs.*, 101 Wn.
10 App. 509, 516 (2000)). Defendants argue that Plaintiff’s breach of contract claim
11 against Low & Bonar must fail because it has not pled the first element – the existence
12 of a contract between Low & Bonar and Stuc-O-Flex. Dkt. # 12 at 11.

13 In the Amended Complaint, Plaintiff alleges that Low & Bonar “assumed” its
14 exclusive distribution agreement with Defendants Ural and Waterway when Low &
15 Bonar purchased 100% of Walflor’s stock. Dkt. # 1-2 at ¶ 4.9. Defendants are correct
16 that the Amended Complaint pleads very few facts to support Plaintiff’s claim that Low
17 & Bonar assumed the exclusive distribution agreement. Although Plaintiff alleges that
18 Low & Bonar purchased Walflor’s stock via a stock purchase agreement, he admits that
19 the stock purchase agreement did not reference Ural’s exclusive distribution agreement
20 with Stuc-O-Flex. Dkt. # 1-2 at ¶¶ 3.35–3.36. Under the agreement, Low & Bonar
21 agreed to “purchase and acquire, all of [Walflor’s] Stock.” Dkt. # 13-1 at 7. Nowhere
22 in the agreement does Low & Bonar agree to assume liabilities arising from Walflor’s
23 alleged distribution agreement with Stuc-O-Flex. See Dkt. # 13-1.

24
25 _____
26 ² In its Opposition, Plaintiff asks the Court to consider facts outside the pleadings and to
27 convert Defendants’ motion into a motion for summary judgment under Fed. R. Civ. P.
12(d). The Court declines to do so at this time.

1 Contrary to Plaintiff's assertion (Dkt. # 15 at 12), a corporation that executes a
2 stock purchase agreement of another company does not automatically assume all the
3 "benefits and liabilities" of the underlying corporation. *United States v. Bestfoods*, 524
4 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our
5 economic and legal systems' that a parent corporation (so-called because of control
6 through ownership of another corporation's stock) is not liable for the acts of its
7 subsidiaries.") (internal citations omitted). Instead, the Court must consider the extent
8 to which Walflor continued to exist and operate as an independent entity and Low &
9 Bonar's involvement in Walflor after the sale. *See Seattle Inv'rs Syndicate v. W.*
10 *Dependable Stores of Washington*, 177 Wash. 125, 127 (1934) (" 'Where the new
11 corporation is in its essence but a continuation of the activities and interests of the old
12 company, which retains simply its franchise as a corporation, thus becoming practically
13 extinct as an active entity, direct recovery is allowable.' ") (internal citations omitted).
14 Plaintiff alleges no facts in its breach of contract claim suggesting that Walflor was a
15 mere "shell" of Low & Bonar or that it ceased to operate as an independent entity
16 following the sale.

17 In its Opposition, Plaintiff points to additional factual evidence obtained through
18 discovery, and ongoing discovery requests that he anticipates will "address the question
19 of Low & Bonar's use of Walflor as a mere instrumentality or alter ego." Dkt. # 15 at
20 14. But at the motion to dismiss phase, a court typically cannot consider evidence
21 beyond the four corners of the complaint, without converting the motion to a motion for
22 summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).
23 Plaintiff's conclusory assertion that Low & Bonar assumed the distribution agreement,
24 without any supporting factual allegations, is insufficient to survive a motion to dismiss.
25 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Nor does a complaint suffice if it tenders
26 'naked assertion[s]' devoid of 'further factual enhancement.' ").
27

2. Tortious Interference

Defendants next argue that Plaintiff has failed to state a claim for tortious interference against any of the defendants. In Washington, a tortious interference claim is comprised of the following elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 455 n. 11 (9th Cir. 1994) (citing Restatement (Second) of Torts § 766(B) (1979)); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash. 2d 133 (Wash. 1997) (en banc).

To prevail on a tortious interference claim, the plaintiff must show that the defendant's purpose or means were improper. *Maxner Co. v. Costco Wholesale Corp.*, 47 F. App'x 856, 858 (9th Cir. 2002). "Factors to be weighed in determining the impropriety of the defendant's interference are discussed in [the Restatement (Second) of Torts] § 767." *Pleas v. City of Seattle*, 112 Wash. 2d 794, 802 (1989). "Thus a cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Pleas*, at 803-804 (citing *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1368 (1978)).

1. Tortious Interference Against Defendants Ural and Waterway

Defendants first move to dismiss Plaintiff's claim for tortious interference against Defendants Ural and Waterway, arguing that the doctrine of tortious interference does not apply to parties to the contract. Dkt. # 12 at 14. The Court agrees.

Washington courts have consistently held that the doctrine of tortious interference cannot be applied to individuals or entities that are parties to the contract. *See e.g. Olson v. Scholes*, 17 Wash. App. 383, 390 (1977). Instead, a tortious interference cause

1 of action may only be brought against “outsiders” who interfere with the contract. *Id.*
2 If a plaintiff seeks to recover against parties to the contract, the cause of action must
3 “arise from the violation or breach of the contractual relationship.” *Id.* (citing *Stauffer*
4 *v. Fredericksburg Ramada, Inc.*, 411 F. Supp. 1136 (E.D. Va. 1976); *Sherman v. Weber*
5 *Dental Mfg. Co.*, 285 F. Supp. 114 (E.D. Pa. 1968); *Wild v. Rarig*, 302 Minn. 419
6 (1975), *appeal dismissed*, 424 U.S. 902 (1976); *Hein v. Chrysler Corp.*, 45 Wash. 2d
7 586 (1954); *Cherberg v. Peoples Nat’l Bank*, 15 Wash. App. 336 (1976). To the extent
8 that Plaintiff seeks to bring a tortious interference claim against Defendants Ural or
9 Waterway, both parties to the exclusive distribution agreement, Plaintiff’s claim must
10 be dismissed.

11 2. Tortious Interference Against Defendants Walflor and Low & Bonar

12 Defendants also contend that Defendants Walflor and Low & Bonar cannot be
13 held liable for interfering with an agreement that Plaintiff alleges they also assumed
14 because a party to a contract cannot be held liable for interfering with that contract.
15 Dkt. # 12 at 14. Defendants are correct that Plaintiff appears to be alleging two
16 conflicting causes of action, however, under Fed. R. Civ. P. 8(d)(2), parties may set
17 forth alternative claims in a complaint. A pleading “should not be construed as an
18 admission against another alternative or inconsistent pleading in the same case.” *Total*
19 *Coverage, Inc. v. Cendant Settlement Servs. Grp., Inc.*, 252 F. App’x 123, 126 (9th Cir.
20 2007) (citing *McCalden v. California Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir.
21 1990) (internal citation omitted). Moreover, a party “need not use particular words to
22 plead in the alternative” if “it can be reasonably inferred that this is what [it was]
23 doing.” *Holman v. Indiana*, 211 F.3d 399, 407 (7th Cir.), *cert. denied*, 531 U.S. 880
24 (2000); *see also G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 536
25 (S.D.N.Y. 2002); *Pair–A–Dice Acquisition Partners, Inc. v. Board of Trustees of the*
26 *Galveston Wharves*, 185 F.Supp.2d 703, 708 n. 6 (S.D. Tex. 2002).

1 Here, there is a legitimate question as to whether Defendants Walflor and Low &
2 Bonar assumed the exclusive distribution agreement, justifying the pleading of
3 alternative claims. Accordingly, the Court declines to dismiss Plaintiff's tortious
4 interference claim on these grounds.

5 3. Tortious Interference Against Non-Contracting Defendants

6 Finally, Defendants argue that Plaintiff has failed to state a claim of tortious
7 interference against the remaining "non-contracting" defendants. Dkt. # 12 at 14–18.
8 Here, Plaintiff has sufficiently pled the existence of a contractual relationship – the
9 exclusive distribution agreement between Plaintiff and Defendants Ural and Waterway.
10 Dkt. # 1-2 at ¶ 3.12. For the purposes of this motion to dismiss, the Court finds that
11 Plaintiff has also sufficiently alleged that Defendants PacificWest, Hewitt, Walflor,
12 Low & Bonar, and Czerwinski (collectively the "non-contracting Defendants") had
13 knowledge of Defendant Ural's agreement with Plaintiff. Dkt. # 1-2 at ¶ 5.3.

14 Even the most generous reading of Plaintiff's complaint, however, does not
15 permit the conclusion that the non-contracting Defendants induced or caused a breach of
16 the distribution agreement. Plaintiff alleges that the non-contracting Defendants
17 "intended to interfere with Defendants Ural and Waterway Rainscreen LLC's
18 contractual obligations or should have known that their actions would interfere"
19 Dkt. # 1-2 at ¶ 5.6. This is insufficient to state a claim for tortious interference.
20 Plaintiff does not allege any facts suggesting that the non-contracting Defendants
21 caused Ural and Waterway to breach their agreement with Plaintiff.

22 Plaintiff alleges that Ural and Waterway breached the agreement when they sold
23 rainscreen products to PacificWest who, in turn, distributed the products to other
24 customers, but this is not sufficient to show that the non-contracting Defendants caused
25 Ural and Waterway to breach the agreement. Dkt. # 1-2 at ¶ 3.17. Plaintiff's
26 allegations that Defendants Walflor and Low & Bonar sold rainscreen products to other
27 entities are equally unavailing. Dkt. # 1-2 at ¶¶ 3.30, 3.38 While it is plausible to

1 conclude that Ural and Waterway intended to breach the agreement, Plaintiff has
2 alleged insufficient facts to show that the non-contracting Defendants caused the breach.

3 Even assuming the non-contracting Defendants did cause the breach, Plaintiff
4 alleges insufficient facts to establish an improper purpose or improper means. *Pleas*, at
5 1163. An improper purpose in the context of a tortious interference claim is the
6 “improper objective of harming the plaintiff” *Pleas v. City of Seattle*, 774 P.2d
7 1158, 1163 (Wash. 1989). Plaintiff alleges only that the non-contracting Defendants
8 “intended to interfere” with the exclusive distribution agreement but alleges no facts
9 suggesting that they had an improper purpose or motive. At most it is plausible to
10 conclude that the non-contracting Defendants had knowledge of the agreement, but
11 knowledge, without more, is insufficient to state a claim for tortious interference. *Mann*
12 *Law Grp. v. Digi-Net Techs., Inc.*, No. C13-59RAJ, 2013 WL 3754808, at *4 (W.D.
13 Wash. July 15, 2013) (“mere knowledge . . . does not demonstrate . . . an improper
14 purpose.”).

15 4. Tortious Interference with Stuc-O-Flex Customers

16 Finally, Plaintiff’s claim that Defendants “interfered with Plaintiff Stuc-O-Flex’s
17 customers” must also fail. In the Amended Complaint, Plaintiff alleges that Defendants
18 “intended to interfere with Plaintiff Stuc-O-Flex’s customers in the United States and
19 Canada that Stuc-O-Flex sought to protect when it entered into the Exclusive
20 Distribution Agreement” Dkt. # 1-2 at ¶ 5.7. Plaintiff’s cursory recitation of the
21 elements of the offense, however, is not supported by adequate facts.

22 For example, Plaintiff does not identify any specific customers or contracts that
23 Defendants purportedly interfered with. To the extent that Plaintiff is alleging
24 Defendants interfered with a “business expectancy,” Plaintiff’s allegations are still
25 lacking. To make a claim for tortious interference with a business expectancy, Plaintiff
26 must identify a “specific relationship” and “identifiable third parties.” *Pac. Nw.*
27 *Shooting Park Ass’n v. City of Sequim*, 158 Wash. 2d 342, 352-353 (2006). Unspecified

1 references to “customers” are not enough. *Pac. Nw. Shooting Park Ass'n v. City of*
2 *Sequim*, 158 Wash. 2d 342, 353 n.2 (2006) (“[t]o show a relationship between parties
3 contemplating a contract, it follows that we must know the parties’ identities.”).
4 Accordingly, the Court finds that Plaintiff has failed to state a claim for tortious
5 interference.

6 **3. Alter Ego/Piercing the Veil**

7 Finally, Defendants argue that Plaintiff’s alter ego/piercing the veil claim
8 should be dismissed because this is a legal theory, not a stand-alone cause of action.
9 Dkt. # 12 at 18-19. Defendants are correct that a “request to pierce the corporate veil is
10 only a means of imposing liability for an underlying cause of action and is not a cause
11 of action in and of itself.” *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185
12 F.3d 978, 985 (9th Cir. 1999). Instead, the “piercing the corporate veil” doctrine should
13 be used to impose liability for other substantive claims. *Holland Am. Line, N.C. v.*
14 *Orient Denizcilik Turizm Sanayi VE Ticaret, A.S.*, No. C17-1726-JCC, 2018 WL
15 3742197, at *8 (W.D. Wash. Aug. 7, 2018) (holding “alter ego and piercing the
16 corporate veil are ‘a means of imposing liability for an underlying cause of action and
17 [are] not a cause of action in and of [themselves].’ ”) (internal citation omitted). Indeed,
18 Plaintiff concedes that “its claim of alter ego liability and piercing the corporate veil are
19 not separate causes of action from its underlying claims . . .” but argues that it is
20 inappropriate to dismiss legal theories at the motion to dismiss stage. Dkt. # 15 at 20.
21 If Plaintiff wishes to assert liability under the doctrine of “piercing the corporate veil” it
22 must do so within the context of its other substantive causes of action. To the extent
23 Plaintiff is attempting to assert the “alter ego/veil piercing” doctrine as a separate cause
24 of action, this claim is dismissed.

25 **III. CONCLUSION**

26 For the foregoing reasons, Defendants’ Partial Motion to Dismiss (Dkt. # 12) is
27 **GRANTED**. Within **fourteen (14) days** of this order, Plaintiff may amend its

1 complaint to address the deficiencies described in this Order. The Court recognizes that
2 the parties have filed pending motions for summary judgment in this matter that will be
3 impacted by this Order. Accordingly, the Court terminates the pending motions for
4 summary judgment (Dkt. ## 25, 29, 43). The parties will have **sixty (60) days** to re-file
5 their dispositive motions.

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7 DATED this 26th day of September, 2019.

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11 The Honorable Richard A. Jones
12 United States District Judge
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